REPRESENTATIONS BY ADV P TLAKULA: CHAIRPERSON OF THE ELECTORAL COMMISSION TO THE AD HOC COMMITTEE OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF SOUTH AFRICA ON THE PUBLIC PROTECTOR'S REPORT NO. 13 OF 2013/2014

INTRODUCTION

1. In a letter dated 26 September 2013 the Ad Hoc Committee of the National Assembly of the Republic of South Africa ("**the Committee**") invited me to make written representations to the Committee regarding the Public Protector's Report No. 13 of 2013/204 dated 26 August 2013 ("**the Report**").

2. I welcome the opportunity extended to me by the Committee to make representations on the Report.

3. My representation is structured as follows -

   3.1. The legal framework which informs the work of the Public Protector;

   3.2. Procedural irregularities in the conduct of the investigation;

   3.3. Submissions on the Findings of the Public Protector;

   3.4. Submissions on the Remedial Action recommended by the Public Protector;

   3.5. Misdirection on questions of law made by the Public Protector in the Report; and

   3.6. Conclusion.

THE LEGAL FRAMEWORK

4. I point below to various prescripts of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") and the law which circumscribe the processes of the office of the Public Protector.

5. The office of the Public Protector is established in terms of section 182(1) of the Constitution as regulated by national legislation, to investigate any conduct in state affairs or in the Public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take remedial action.[1]

6. In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation, *viz.* The Public Protector Act, 1994.[2]

7. The office of the Public Protector is an organ of state within the meaning of section 239 of the Constitution and is as such a functionary or institution exercising a power or performing a function in terms of the Constitution or exercising a Public power or performing a Public function in terms of any legislation.[3]

8. In terms of section 1 of the Constitution, the Constitution is the supreme law of the land, with one of its founding values being the rule of law - meaning that the Public Protector is subject to the Constitution and can exercise no power or perform any function unless so authorised by law. Where any exercise of Public power is made, the exercise of such power must obtain within that empowering law.[4]

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[1] See section 182(1) of the Constitution, 1996
[2] See section 182(2) of the Constitution. 1996 read with section 6 (7) and (8) of the Public Protector Act
[3] See section 239 of the Constitution. 1996; See also Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 at para 49D-E; Pharmaceutical Manufacturers Association of SA and Another: In re: Ex parte President of the RePublic of South Africa and Others 2000 (2) SA 674 (CC) at para 20; Fedsure Life Assurance Ltd and Others v Greater Johannesburg Traditional Metropolitan Council and Others 1999 (1) SA 374 (CC) at para 58
[4] See section 1(c) of the Constitution. 1996

9. The Constitution also provides under section 8 that the Bill of Rights applies to all law and binds all organs of state including the office of the Public Protector.[5]

10. Everyone, including me, has the constitutional right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution.[6]

11. I, like everyone, have an inherent right to dignity and thus the right to have my dignity respected and protected as provided for in section 10 of the Constitution.

12. Under the Promotion of Administrative Justice Act, 2000 ("**PAJA**") any person including me has a right to procedural fairness where the action of the Public Protector materially and adversely affects her rights or legitimate expectations. The procedural fairness though depending on the circumstances of each case includes that I must be given adequate notice of the nature and purpose of the proposed action against me and amongst others a reasonable opportunity to make representations.[7]

13. The procedural fairness to which I am entitled includes the right to obtain assistance, and in serious or complex cases, legal representation; present and dispute information and arguments; and to appear in person unless there are justifiable circumstances to depart from such procedure.[8]

14. The Public Protector has the power to determine the format and the procedure to be followed in conducting any investigation with due regard to the circumstances of each case.[9]

15. For the purposes of conducting an investigation, the Public Protector has the power to direct any person to submit an affidavit or affirmed declaration or to

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[5] See section 8 of the Constitution
[6] See section 33 of the Constitution
[7] PAJA section 3
[8] See section 3 (2) read with section 3 (4) PAJA
[9] See section 7(1)(b)(i) of the Public Protector Act, 1994

appear before her to give evidence or to produce any document in their possession or under their control which has a bearing on the matter being investigated and may examine such a person.[10]

16. In terms of section 7 (9) of the Public Protector Act, 1994 where it appears to the Public Protector during the course of an investigation that any person is being implicated (like me in this case) and that such implication may be to the detriment of such a person or an adverse finding may result, the Public Protector must afford such a person an opportunity to respond in connection therewith. The implicated person may have a legal representative with a right to question other witnesses[11].

17. The Public Protector has the power to make rules in respect of any matter which has a bearing on an investigation or in respect of any matter incidental thereto. The rules however, must be published in the Government Gazette and tabled in the National Assembly[12].

PROCEDURAL IRREGULARITIES IN THE CONDUCT OF THE INVESTIGATION

18. The investigation conducted by the office of the Public Protector in this instance was fraught with numerous procedural and substantive irregularities.

19. Although the Committee has requested me to make representations on the findings in the final report of the Public Protector, I deemed it important to bring to the attention of the Committee the procedural irregularities that I raised with the Public Protector in my response to the Provisional Report. I point to these hereunder:

    19.1. On 13 July 2012 and in a further representation to the Public Protector, I specifically requested that the Public Protector must determine the format and the procedure in conducting the investigation concerning the lease agreement. There was no

[10] See section 7(4) of the Public Protector Act, 1994
[11] See Section 7(9) of the Public Protector Act, 1994.
[12] See Section 7(11) of the Public Protector Act, 1994.

response to the request nor was a format and procedure determined by the Public Protector as required by section 7(1) of the Public Protector Act. I made this request because I wanted to participate in a process whose procedure was certain. In so far as a format may have been prescribed, such was never communicated to me. The response of the Public Protector on this issue was that she "*had no obligation of presenting you with an investigation plan or names of witnesses that I was going to interview prior to and/ or during the investigation as I could find no provision in either the Public Protector Act or Constitution or any other laws that justified the expectation that you raised to the effect that you had to be informed of the investigation process to be followed. That is for me to determine and I had no obligation to disclose it to you.*" The failure to disclose the procedure to be followed, I submit, vitiates against the fairness of the process;

19.2. In response, I brought to the attention of the Public Protector that section 7(8) read with section 7(9)(b)(ii) of the Public Protector Act confers a right on a person appearing before the Public Protector to be assisted by an advocate or attorney. The draft Rules published in Government Notice 1085 of 2010 relating to investigations by the Public Protector provide that the processes of the Public Protector are to be conducted in a fair manner. In this instance the Public Protector ruled that the legal representative appearing with me could only "*whisper*" to me with no right to speak, thus essentially depriving me of the right to legal representation.

19.3. The Public Protector in the meeting of 6 July 2012, which I attended with my legal representative stated that "*her processes do not follow the common law but follow the civil law*". It is clear from this that the Public Protector does not accept that she is bound to follow the rules of natural justice. This is irregular, both procedurally and substantively.

19.4. In the same meeting, the Public Protector refused to clarify my status. This is inconsistent with the clear provisions of the Public Protector Act which distinguishes between persons from whom information is sought and those persons who are implicated in the investigation.

19.5. After my appearance at the meeting with the Public Protector on 6 July 2012, I requested the Public Protector for a copy of the transcript of my interview. Despite her undertaking on more than one occasion to do so, this was only furnished to me on 4 October 2013 following another written request from my lawyers.

19.6. In my response to her Provisional Report, I requested the Public Protector to furnish me with copies all transcripts of witnesses interviewed during the investigation to allow me to make meaningful representations including whether her findings were consistent with the evidence that was placed before her. In response to this request, the Public Protector stated that *"we will unfortunately not provide copies of transcripts of interviews with other witnesses."* without providing me any reasons for her refusal.

19.7. The Report refers to *"a complaint"* filed by anonymous IEC employees dated 20 July 2012. A copy of this complaint was not made available to me nor did the allegations contained therein put to me for my response. I only learnt of this complaint for the first time when I read the Provisional Report which had been furnished to me and numerous other people for comment. Moreover, this complaint contained in it, amongst others, an allegation that I was involved in a romantic relationship with Mr Thaba Mufamadi, MP. The Public Protector, despite her protestations to the contrary, had investigated this issue without putting it to me.

19.8. It came to light that the office of the Public Protector had interviewed Reitumetse N.B Sethoba (**"Ms. Sethoba"**), my former Personal Assistant who was mentioned in the letter by *"concerned IEC*

employees" as the source to whom these allegations were attributed. I include herewith marked **"PT1"** a copy of the statement compiled by Ms. Sethoba regarding the interview given to her by the Office of the Public Protector. This information was not disclosed in the Provisional Report.

19.9. The Provisional Report does not also mention that in the interview, Ms Sethoba refuted these allegations.

19.10. I submitted to the Public Protector that failure to refer to the interview with Ms. Sethoba was most sinister. Firstly, Ms. Sethoba must have been confronted at the interview with the document anonymously drawn by "*concerned IEC employees*" which was quoted in the Provisional Report. It is manifest that the Public Protector knew of these allegations before drafting the Provisional Report and must have consciously elected not to have this information placed before me for comment or response.

19.11. The other irregularity is that it is also obvious that the Public Protector did not intend to respect the duties imposed on her and described in section 7(9) of the Public Protector Act. The section states in peremptory language that a person implicated in an investigation by the Public Protector shall be afforded an opportunity to respond. No such opportunity was granted to me in respect of the allegations of a sexual relationship between me and Mr. Mufamadi despite that these allegations feature prominently in the Provisional Report;

19.12. I submit that the failure to put these allegations to me and invite me to respond was not an oversight, was unfair and tantamount to abuse of power. This more so that when the Deputy Chairperson of the Electoral Commission was invited by the Public Protector to solicit members of staff who wished to be interviewed concerning the allegations in the letters of 20 July and 24 August 2012, without affording the same opportunity to me. I annex herewith marked **"PT2"**

a copy of the aforementioned letter to the Deputy Chairperson of the Electoral Commission dated 5 September 2012. In the letter, there is reference made to the complaint of the "*concerned IEC employees*" dated 20 July 2012 wherein these allegations of sexual impropriety are contained.

19.13. The provisions of section 7(9)(b)9ii) also confer upon an implicated person or his /her legal representatives the right to put questions to witnesses. I was not afforded the right to put questions to any witnesses, particularly witnesses making the allegations of a sexual relationship between me and Mr. Mufamadi, which are most damaging to my reputation and injurious to my dignity.

19.14. It is not an answer for the Public Protector to use the opportunity for me to respond to the Provisional Report as a platform for compliance with her obligation to afford me a hearing (*audi alteram partem* rule).

19.15. In her response to my submission, the Public Protector indicated amongst others that she did not investigate the allegation of sexual impropriety, stating that "*my decided (sic) to not investigate further this allegation (after the interview with Ms. Sethoba refuting any truth in the allegation) was to protect the integrity of the investigation as well as the integrity of Adv. Tlakula and Mr. Mufamadi.*" In response, I pointed out to her that by her own admission her team had interviewed Ms. Sethoba and that such interview could not by any interpretation constitute anything but an investigation. Further that it was clear from the reading of the Provisional Report that she had investigated this allegation. Unfortunately I do not have any way of verifying who else her office interviewed on these allegations because the Public Protector turned down the request to provide me with copies of transcripts of interviews she conducted with other witnesses.

19.16. As it would appear from the Report, these allegations, as the Public Protector would admit, had no bearing on the subject of the investigation yet she still made reference to them in the final report.

19.17. It has taken the Public Protector since October 2011 (approximately 21 months) to investigate and produce the Provisional Report and yet she gave me seven (7) days within which to respond. The timelines were prejudicial to afford me a reasonable opportunity to give a full and complete rebuttal of the findings, on both matters of fact and law, made in the Report. Confronted with a firm view by the Public Protector that she will not consider any extension of time, it would have been futile to ask for one to enable me to make a comprehensive response. It was clear from the letter dated 13 July 2013 that the Public Protector had already made up her mind and was not open to any persuasion on this aspect. This letter is attached as **"PT3."** For this reason, I am grateful to the Committee for affording me the opportunity to make this submission.

19.18. I attach herewith copies of the following documents:

19.18.1. The relevant parts of my submission to the Provisional Report marked **"PT4."**

19.18.2. The response of the Public Protector to my submission dated 27 July 2013 marked **"PT5"**;

19.18.3. The response dated 31 July 2013 to the Public Protector's letter of 27 July 2013 submitted on my behalf through my Attorneys Mkhabela Huntley Adekeye Inc. marked **"PT6."**

RESPONSE ON THE FINDINGS IN THE FINAL REPORT

Introduction

20. When I appeared before the Public Protector on the 6 July 2012, the questions that the Public Protector posed to me focussed more on the allegations of conflict of interest than on the process that we followed in the procurement of the Riverside Office Park. She did not specifically pose questions on which she made findings of gross irregularity, improper conduct and maladministration in relation to the process. In this regard, her findings are based on the documentation that she had requested. Moreover, the findings of the Public Protector in the Provisional Report to which I was invited to make submissions are substantially different from the findings in the final report. I therefore also welcome the opportunity to make submissions on the final report.

21. Before I address the findings on the procurement process, I wish to give the following background information on how the Commission acquired premises before the procurement of the Riverside Office Park.

22. The Electoral Commission leases 244 offices at municipal, provincial and the national levels. Prior to the procurement of the Riverside Office Park building it did not acquire accommodation by means of a Public bidding process. The Electoral Commission at that time procured accommodation by contacting estate agents and then deciding on a suitable option from amongst those that were available and affordable. This was confirmed by the Deputy Chairperson of the Commission in his interview with the Public Protector on pages 53-54, paragraphs 6.3.4.4-6.3.4.7 of the Final Report. No audit issues of any kind arose in these matters at the time.

Identification of Menlyn Corporate Park

23. When the need for alternative accommodation became critical in 2008 we initially followed a similar process with the identification of Merlyn Corporate Park as a suitable option. The user department (Support Services) identified a number of options for consideration.

24. The Commission had conditionally approved the Menlyn Corporate Park building on 12 January 2009 subject to site visits. The minutes of the Commission meeting are included as Annexure **"PT7"**. This conditional approval was followed by visits to two sites by four Commissioners and senior officials. I was not part of these site visits. I felt uncomfortable with the process that we had followed in the identification of Menlyn Corporate Park as it was not identified following an open or Public process. I decided that a Public process should be followed.

Findings of the Public Protector in relation to Menlyn Corporate Park

25. The Public Protector makes the following findings in relation to the decision that I took to reverse the conditional approval of the Commission in respect of Menlyn Corporate Park:

25.1. That I failed to obtain the resolution of the Commission rescinding the Menlyn Corporate Park award before commencing with a new process and in doing so, appeared to be "*high-handed*" and "*countermanded*" the decision of the Commission (see paragraphs 10.2.2 and 10.2.5 of the Final Report).

25.2. That my conduct in this regard, was "*highly irregular, improper and constituted maladministration*" (see paragraphs 10.2.6, 10.2.7 and 10.2.9 of the Final Report.

26. My submission in respect of these findings is as follows:

26.1. It is correct that I took a decision to reverse the conditional approval of the Menlyn Corporate Park and did so before obtaining the Commission resolution to do so. I took this decision because as the Accounting Officer, I became concerned that the process that we had followed was not transparent. I took this decision before Menlyn Corporate Park was informed about the approval of their offer. I have to mention that the Commission at its meeting of 9 March 2009, had

no objection to rescind its conditional approval of Menlyn Corporate Park which it took on 12 January 2009. (see annexed as "**PT8**" minutes of the Commission meeting of 9 March 2012.

26.2. Section 38 of the Public Finance Management Act 1999 ("**PFMA**") places the responsibility for determining the procurement and provisioning system with the Accounting Officer. In terms of this section, the Accounting Officer is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution.

26.3. The Procurement Policy of the Commission, that was in force at the time vested the authority to procure on behalf of the Commission with the Chief Electoral Officer ("**CEO**"), who is also the Accounting Officer. The policy stated in paragraph 4.2 (a) that the Chief Electoral Officer (i.e., the Accounting Officer) procures goods and services for the Electoral Commission and arranges for the hiring of goods and services and the acquisition or granting of any right for or on behalf of the Electoral Commission, and disposes of moveable assets subject to compliance with S12(2) of the Electoral Commission Act, Section 38 (a) iii) of the PFMA, the Treasury Regulations and the Act. In respect of goods services with a value in excess of R2 million, the CEO does so after consultation with the Commission.

26.4. Given that the responsibility for determining the procurement and provisioning system vests with the Accounting Officer, my view was that there was no need to obtain a resolution from the Commission before reversing what I regarded as a flawed process. My view is that I acted responsibly as the Accounting Officer to ensure that an open, fair and competitive process was followed. As I have already indicated, the Commission had no objection when this was formally reported to them on 2 March 2009 and rescinded their earlier decision.

27. In the light of the above explanation, I respectfully submit that I acted lawfully within my authority as the Accounting Officer and did so responsibly. I am surprised that the Public Protector uses this very decision on my part to make conclusions of impropriety against my conduct in this regard.

Findings in respect of the procurement of Riverside Office Park

28. Before I address the specific findings of the Public Protector in respect of the procurement process to acquire the Riverside Office Park, I believe it is important to sketch the procurement environment and approach that applied in the Electoral Commission at the time, which was as follows:

28.1. I am informed that during the initial setup phase of the Electoral Commission in 1998 - 2000 specifications for bids were compiled by line managers and then advertised. This, I am told, caused many practical problems and functional emergencies as many specifications were either under or overstated. These challenges led to the establishment of a Procurement Committee in 2001, which verified specifications before Publication, evaluated bids and made recommendations to the Accounting Officer in conjunction with EXCO. This applied where certain thresholds were exceeded and related to both specifications as well as awards. Below these thresholds the recommendations by the procurement committee were made to line managers. EXCO and the Accounting Officer had a much closer involvement in procurement matters of significance than generally applies in most of the Public service.

28.2. In 2004, the Commission adopted a Procurement Policy and Procedure which formalized the establishment of the Procurement Committee. This Policy, which was revised in 2005, also established an Evaluation Committee. The Procurement Committee considered specifications and recommendations for the procurement of goods and services. The Procurement Committee considered draft specifications from line departments and made recommendations on

their approval to EXCO who made a final decision. An Evaluation Committee considered bids and made recommendations to the Procurement Committee. The Procurement Committee considered these recommendations prior to making a recommendation to EXCO. EXCO could make a final decision with respect to recommendations received from the Procurement Committee if the amount in question was less than R2 million. In cases where the amount was R2 million or more EXCO approved the recommendation after consultation with the Commission. This Policy applied at the time of the Riverside Office Park award. A copy of the Procurement Policy is attached hereto as Annexure "**PT9**"

Submission in respect of each finding:

29. The report states: "**The process followed by Adv. Tlakula and her EXCO in the procurement of the Riverside Office Park was grossly irregular as it was characterized by a violation of procurement legislation such as section 38 of the PFMA, Treasury Regulation 5.1 and 16A6, section (1) (e) of the PPPFA as well as Chapter 4 of the Electoral Commission's Procurement Policy and Procedure of 10 March 2005.**" (*paragraph 10.2.1 of the final report*)

Section 38 of the PFMA

30. In terms of section 38 of the PFMA an Accounting Officer must ensure that a constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent and cost-effective. This section places the legal responsibility for determining the procurement and provisioning system with the Accounting Officer.

31. Given that the responsibility for determining the procurement and provisioning system vests with the Accounting Officer, the authority to amend that process also vests with the Accounting Officer.

32. The Accounting Officer approved that the process to be used in the procurement of Riverside Office Park be different to the norm, given the fact that the matter was sufficiently significant and urgent. In 2009 the Electoral Commission was in the middle of conducting the 2009 general elections and a move had to be completed as soon as possible after these elections and seamlessly not to impede on the preparations for the 2011 municipal elections soon thereafter. This required precise management at a senior level.

33. I am of the view that in light of the above I exercised the power conferred upon me in terms of Section 38 of the PFMA.

Treasury Regulation 5.1

34. Treasury Regulation 5.1 provides as follows:

34.1. Each year, the accounting officer of an institution must prepare a strategic plan for the forthcoming Medium Term Expenditure Framework (MTEF) period for approval by the relevant executive authority.

34.2. The Electoral Commission included accommodation needs in its 2009 strategic plan and the 2010 MTEF and Estimate of National Expenditure (ENE) submissions to the National Treasury. The relevant extracts are attached at Annexure **"PT10".**

Treasury Regulation 16A6

35. Treasury Regulation 16A6 reads as follows:

35.1. 16A6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

35.2. 16A6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for –

(a) the adjudication of bids through a bid adjudication committee;

(b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;

(c) the selection of bid adjudication committee members;

(d) bidding procedures; and

(e) the approval of bid evaluation and/or adjudication committee recommendations.

35.3. 16A6.3 The accounting officer or accounting authority must ensure that –

(a) bid documentation and the general conditions of a contract are in accordance with –

(i) the instructions of the National Treasury; or

(ii) the prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;

(b) bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

(c) bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine;

(d) awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised;

35.4. 16A6.4 If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.

Section 2(1)(e) of the Preferential Procurement Policy Framework Act 2000 (PPPFA)

35.5. Section 2(1)(e) of the PPPFA is as follows:

35.5.1. An organ of state must determine its preferential procurement policy and implement it within the following framework:

35.5.1.1. (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender.

35.6. The specific process determined for this procurement transaction was that EXCO would act as a Bid Evaluation Committee as required by TR16A.6.2 (b) and that the Commission would act as the Bid Adjudication Committee as envisaged by TR16A.6.2 (a) and (b), and would select and approve the successful bidder in terms of TR16A.6.2 (e). EXCO and the Commission existed within the Commission structure.

35.7. The bidding procedure determined in accordance with TR16A.6.2 (d) was that a Public advertisement would be issued requesting proposals from prospective suppliers.

35.8. Having said this, the following aspects of Treasury Regulations 16A6 and Section 2(1)(e) of the PPPFA were however not complied with, namely:

35.8.1. The evaluation and adjudication criteria, including the criteria prescribed in terms of the PPPFA and the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) were not included in the advertisement as required by TR16A.6.3(b).

35.8.2. The bid, although it was advertised in several local newspapers (Sowetan, Pretoria News, The Star, Beeld and The Citizen) was also not advertised in the Government Tender Bulletin as required by TR16A6.3 (c).

35.9. Failure to include the evaluation and adjudication criteria in the advertisement also violated Section 2(1)(e) of the PPPFA.

35.10. Non-compliance with the above-mentioned Treasury Regulations and PPPFA prescripts resulted in the Auditor General (AG) declaring the expenditure for the procurement of rental accommodation as irregular.

35.11. We disclosed this irregular expenditure in the 2010/11 Annual Financial Statements and will disclose it as such in every subsequent year for the duration of the lease agreement.

35.12. Our Annual Financial Statements for the year 2010/11 formed part of the Annual Report to the National Assembly and were discussed during the presentation of this report in the Portfolio Committee on Home Affairs and formed part of a Public record long before the commencement of the investigation by the Public Protector. Therefore, at the time the Office of the Public Protector conducted its investigation, the matter was already dealt with by the AG.

36. The report states that: "**There was no separation of roles and responsibilities between the various committees within the Commission that are tasked with administration of the procurement process i.e. the bid specification, bid evaluation and bid adjudication committees. Though these structures may have existed under different names, they were not used in the matter under investigation.**" (*paragraph 10.2.3 of the final report*)

37. I respectfully do not agree that there was no separation of roles and responsibilities with the procurement of the Riverside Office Park building. The space determination needs analysis were drawn up by the Facilities Management (Support Services) department and the appropriate documents are attached at Annexure **"PT11"**. The further requirements included in the Public advertisement were those used by the Facilities Management department in the process that resulted in the identification of Menlyn Corporate Park. The needs analysis was submitted to the Deputy CEO in charge of Corporate Services and approved by me as the Accounting Officer.

38. As has already been indicated S38 of the PFMA places the responsibility for determining the procurement and provisioning system with the Accounting Officer. I determined that EXCO should deal with the procurement process. In terms of this process, EXCO evaluated the bids and shortlisted four (4) bids that met the requirements in the advertisement. It is important to note that I was not at the meeting of EXCO that shortlisted these bids as I was out of the country on official business. Before I left, I requested the Manager in the Office of the CEO, who also served as the Secretary of EXCO, to ask EXCO to proceed with the procurement process in my absence as the matter had become urgent. I also suggested that three of the qualifying companies should be invited for a presentation as part of the procurement process.

39. Upon my return, I noted that EXCO had shortlisted four (4) companies which were then invited for the presentations. These companies were: Mookoli Properties, Menlyn Corporate Park, New Leaf Property Agency and Abland

(Pty) Ltd. In this regard, see an extract of EXCO minutes dated 15 May 2009 and attached hereto as Annexure **"PT12"**.

40. EXCO invited the four short-listed companies to present their bids. Two of these, namely, Menlyn Corporate Park and Abland (Pty) Ltd were identified as meeting all the requirements. I attended this meeting. See minutes of EXCO attached hereto, as Annexure **"PT13"**. EXCO recommended these two companies to the Commission without indicating a preference and the Commission approved Abland (Pty) Ltd. The Commission acted as a *de facto* Bid Adjudication Committee.

41. Given that the responsibility for determining the procurement and provisioning system vests with the Accounting Officer, the authority to amend that process, in general or in a particular instance, also vests with the Accounting Officer. The Accounting Officer had determined that EXCO would act as the evaluation committee in this instance with the Commission being the de facto adjudication authority. In this case the matter was considered to be sufficiently significant, urgent in view of a pending election and the time consumed by the first abandoned process, and outside of the normal scope of work of the Electoral Commission to warrant it being dealt with at a more senior level than was normally the case

42. The report states that "**The initiation of the procurement process was handled by the user department in consultation with the Supply Chain Management within Commission and by the office of the Deputy CEO, Mr Norman du Plessis, resulting in Adv. Tlakula approving the needs analysis on 13 February 2009. The needs analysis prepared by Mr du Plessis and approved by Adv. Tlakula was not comprehensive enough to include fixtures and the other items subsequently procured as part of a turnkey solution, resulting in poor demand management, leaving a blank cheque to be filled during negotiations with Abland as a sole supplier.**" (*paragraph 10.2.4 of the final report*).

42.1. There were two distinct transactions in respect of Riverside Office Park and these should not be confused. The first relates to the procurement of rental accommodation and the second relates to tenant specific installations and the procurement of moveable assets.

42.2. The Public advertisement covered the tenant specific installations. This arrangement was contained in a letter to Rand Merchant Bank and co-signed by the then Chairperson of the Commission, Dr B Bam stating that costs would be "*rentalised*" and which is attached hereto as Annexure **"PT14"**. This arrangement formed the basis of the subsequent addenda to the lease agreement that were based on actual costs incurred. It must be noted that in terms of Treasury Regulations, the Executive Authority for a constitutional institution is its Chairperson.

42.3. It is correct that the movable portion of the turnkey solution was not part of the Public advertisement and it consequently was not a criterion for the evaluation of bids and played no role in that regard. A turnkey solution was offered by both the two final bidders namely Menlyn Corporate Park and Abland (Pty) Ltd and became part of the subsequent negotiations. Neither company was advantaged or disadvantaged by this approach.

42.4. I respectfully do not agree with the finding that there was a "*blank cheque*" to be filled during negotiations with Abland (Pty) Ltd. The advertisement was for proposals in respect of relocation of the office facilities and the advertisement specifically reserved the Commission's right to accept or reject any proposal on any basis that was regarded as being appropriate.

42.5. Every item that was procured was discussed in weekly site meetings on which a number of senior officials of the Electoral Commission served and that it was followed by a formal quotation in order that appropriateness, a reasonable cost and affordability could be

assessed. No procurement took place without prior written authorisation. Documentation is voluminous but is available for inspection.

43. The report states that "**With regard to the procurement of the Riverside Office Park, a Bid Specification Committee was not set up to analyse the needs of the Commission and draft specifications that would be suitable for the needs of the Commission. Even though the need to make the move as seamless as possible was identified at the needs analysis stage, this was not incorporated in the terms of reference of the request for proposal.**" (*paragraph 10.2.10 of the final report*).

43.1. It is acknowledged that there was no formal Bid Specifications Committee as envisaged by TR16A.6.2(b) and it is for this reason, *inter alia*, that the expenditure was disclosed as irregular.

43.2. As already indicated, the Accounting Officer determined that EXCO would be dealing with this process. In this regard, I finally signed off specifications for bids where the expected value exceeded the threshold value, and this was done.

43.3. The tenant specific installations formed part of the Public advertisement.

43.4. The "*movable*" portion of the turnkey solution was not a bid requirement and only arose as an opportunity when bid proposals were received and it was subsequently pursued. The offer was known but played no part in the evaluation or adjudication of the final two proposals; both which offered the solution.

43.5. The proposals by bidders were comprehensive and in keeping with the advertised condition that the Electoral Commission could consider any proposal on a basis that it regarded appropriate.

44. The report states that "**The EXCO approved a request for proposal in respect of the Commission's accommodation in violation of the provisions of the Chapter 4 of the Commission's Procurement Policy and Procedures, 2005 which provides for three methods of procurement depending on the thresholds. These procurement processes do not include a request for proposal that was suddenly utilised in the procurement of the Riverside Office Park. According to the institution's procurement policy, amounts above R100 000 should be subjected to a tender process.**" (*paragraph 10.2.11 of the final report*).

45. The report states that "**accordingly, there is a process that must be followed in respect of tenders and/or procurement which was not followed in respect of the procurement of the Riverside Office Park.**" (*paragraph 10.2.12 of the final report*).

45.1. S38 of the PFMA clearly places the responsibility for determining the procurement and provisioning system with the Accounting Officer. Given that responsibility for determining the procurement and provisioning system vests with the Accounting Officer, the authority to amend that process also vests with the Accounting Officer.

45.2. I approved that the process to be used in the procurement of Riverside Office Park be different to the norm, given the fact that the matter was sufficiently significant and urgent in view of a pending election. I submit that I had the authority in law to do so.

46. The report states that "**the advertisement of a "request for proposal" for the office accommodation as opposed to a comprehensive competitive tender bidding process violated the provisions of Chapter 4 of the Commission's procurement policy and was accordingly irregular and constituted maladministration.**" (*paragraph 10.2.13 of the final report*).

46.1. I respectfully differ with the finding that the advertisement of the request for proposals which was issued by the Electoral Commission

did not comply with the provisions of chapter 4 of the Commissions Procurement Policy. Chapter 4 merely prescribes threshold of the value of the procurement which may be conducted by way of quotations as well as that which will require a tender.

46.2. I submit that the Electoral Commission in this instance issued a "Request For Proposals (RFP)", the result of which was that the process so conducted was fair, equitable, transparent, competitive and cost effective all be it not squarely within the prescripts of the PFMA.

47. The report states that **"the request for proposal did not comply with provisions of the Treasury Regulations, the PFMA, the PPPFA and the Commission's own procurement policy and procedures, where applicable in respect of:** (*Paragraph 10.2.14 of the final report*).

47.1. **The thresholds for a tender process, which the Commission policy puts at R100 000 unless otherwise approved**; (*paragraph 10.2.14.1 of the final report*).

47.2. **The number of days that it needed to be advertised;** (*paragraph 10.2.14.2 of the final report*).

47.3. **The evaluation process i.e. the evaluation and procurement committee were not involved in the evaluation process**; (*paragraph 10.2.14.3 of the final report*). and

47.4. **The evaluation criterion was not clearly defined at the point of advertising."** (*paragraph 10.2.14.4 of the final report*).

48. I wish to respond as follows to these findings:

48.1. The responses earlier provided to finding 10.2.1 deal comprehensively with this finding (refer to pages 14 to 18 of the Submission).

48.2. The evaluation criteria were clearly stated in the Public advertisement.

48.3. It is correct that, even though applied correctly, the 90:10 (Price/BEE) prescripts as per the PPPFA was not included in the advertisement.

48.4. The moveable portion was not included in the advertisement as it was not specifically anticipated at the time and it was thus not used as criteria in the adjudication of bids.

49. The report states that "**Treasury Regulations provide for deviation from procurement policy in the event of an emergency. There was no motivation from the Commission's EXCO to deviate from a tender process in line with Treasury Regulations. The procurement of the Commission's building was not motivated as an emergency. In any event the circumstances of the move do not qualify as an emergency as defined in paragraph 4.7.5.1 of the Treasury Guides which provides that an emergency is a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery. In this regard, the conduct of Adv. Tlakula and her EXCO was accordingly improper and constitutes maladministration.**" (*paragraph 10.2.15 of the final report*).

49.1. I am not aware of any Treasury Regulation that provides for deviation from Procurement Policy in the event of an emergency, as stated in this finding. I assume that the Treasury Regulation referred to in this finding, is regulation TR16A.6.4, which provides that if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority. Thus the regulation refers to a deviation from competitive bidding NOT a deviation from policy. In this regulation, the grounds for deviation are based on practicality, and are not confined to emergency cases.

49.2. Treasury Practice Note 8 of 2007/08 further clarifies the position of National Treasury stating in paragraph 3.4.3 that "*Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4.*"

49.3. In any event there was a competitive bidding process in respect of the building rental transaction and thus TR16A.6.4 is not applicable to this transaction.

49.4. Although timelines were extremely tight in view of the pending 2011 elections, it is confirmed that the matter was not dealt with as an emergency. Appropriateness of the process and urgency rather than an emergency as defined in Treasury regulations formed the basis of the process that I determined.

50. The report states that "**The irregularity in respect of the procurement of the Riverside Office Park building was also confirmed by the Auditor General in the 2011 audit, recorded in the 2010/2011 Annual Report of the Commission which indicates that "sufficient appropriate audit evidence could not be obtained that the assets with a transaction value of over R500 000 were procured by means of a competitive bidding process as per the requirements of the TR 16A6.1, TR 16A6.4 and National Treasury Practice Note 6 and 8 of 2007/08**". *(paragraph 10.2.16 of the final report).*

50.1. There were two distinct transactions with Riverside Office Park and these should not be confused. The first relates to the procurement of rental accommodation, including the "*rentalisation*" of the costs of fixtures and fittings, and the second relates to the procurement of moveable assets.

50.2. The transaction relating to the procurement of the moveable assets is the transaction that is referred to by the Auditor General in this finding listed in the report of the Public Protector in this paragraph.

50.3. The paragraph that refers to the procurement of the building in the 2010/11 audit report reads as follows: "The evaluation criteria to be used in awarding preference points for quotations between R30,000 and R100,000 and the bid for office accommodation were not specified in the bidding documents. Therefore sufficient appropriate audit evidence could not be obtained that the award was made based on criteria that were consistent with the original invitations for bids as per the requirements of TR16A.3.2"

50.4. It is acknowledged that the finding of the Auditor General is correct, and the expenditure was disclosed as irregular in the financial statements of 2010/11. Reasons for this finding are listed in the explanation to finding 10.2.1 above.

51. The report states that "**An advertisement calling for bids for a provision of office accommodation for the Commission was placed on 27 February 2009 and closed on 09 March 2009. In addition to prompting the decision of the Commission regarding whether or not to rescind its decision to acquire the Menlyn premises, the conduct violated the provisions of the Commission's procurement policy which stipulate that an advertisement in terms of a tender be placed for a minimum of 14 ordinary days. Mr Norman du Plessis was the responsible official directed to execute this function in Adv. Tlakula's memorandum of 11 February 2009. The conduct hereof was accordingly irregular, improper and constituted maladministration.**" (*paragraph 10.2.17 of the final report*).

51.1. It has been comprehensively argued in this submission that a deviation from policy was within the legal powers of the Accounting Officer, and that in any event, a deviation from policy is not a deviation from law, and thus any expenditure arising from such a deviation

cannot be deemed to irregular, improper, or maladministration on this basis alone.

52. The report states that "**Treasury Regulation 16A6 stipulates that bids be advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine. The media schedule was signed on 25 February 2009 by Mr J H Pretorius and there is no evidence that approval was obtained to advertise for a shorter period.**" (*paragraph 10.2.18 of the final report).*

52.1. It is recognised that the failure to advertise in the government Tender Bulletin for the required period, is one of the reasons that the expenditure was declared as irregular (refer to finding 10.2.1 above)

53. The report states that "**The Commission approved the appointment of Abland to provide accommodation for Electoral Commission. The approval did not mention the appointment of Abland for the turnkey solution and the estimated cost of the related services. Abland's proposal stated that this would be negotiated in the future and related costs subjected to an open market process. However, the costs related to the turnkey solution were neither subjected to an open market process nor approved by the Commission as Adv. Tlakula and her EXCO failed to obtain the Commission's approval for the use of a turnkey solution. Their conduct in this regard was irregular and constituted maladministration.**" (paragraph 10.2.19 of the final report).

53.1. TR16A6.4 provides that if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.

53.2. The approval on the basis of practicality to use Abland (Pty) Ltd to provide the furniture as part of a turnkey solution was made by me and it was within my authority to do so. However, I omitted to sign a deviation. It was on this basis that the AG found the expenditure relating to the turnkey irregular. This was disclosed in our financial statements for the financial year in question. In this regard see the communication by the Chief Financial Officer to National Treasury as Annexure **"PT15"**.

53.3. On the basis of the authorisation by National Treasury, the then Acting Chief Electoral Officer condoned the expenditure. See in this regard memo of the Acting CEO as Annexure **"PT16".**

53.4. The turnkey arrangement was offered by both the final two companies that were considered but did not play a role in the adjudication of proposals and was part of subsequent negotiations. The arrangement was justifiable on economic grounds (procurement was done from manufacturers, limiting wholesale and retail margins) and to ensure a seamless move given the pending 2011 elections.)

54. The report states that "**The occupation by the Commission of the building in September 2010 as opposed to April 2010 as indicated in their advertisement is problematic in that bidders who proposed a later date were not considered during the evaluation process. This could have also prejudiced other bidders who did not submit their proposals based on the requirement for occupation being April 2010.In this regard, the conduct of Adv. Tlakula and the EXCO in handling the entire move was improper and constituted maladministration**". (*paragraph 10.2.20 of the final report*).

54.1. No bid was disallowed on the basis of a projected occupation date. The matter was dealt with as practical as possible.

55. **In connection with allegations of impropriety relating to inconsistent monthly rental amounts paid to the Riverside Office Park Trust from September 2010 to September 2011**: (*paragraph 10.3 of the final report*).

55.1. The report states that "**The amounts did vary as evident in Table 14 covered in paragraph 6.3.28.6 of the main report and this was conceded by the Commission. For example, rental was R1 440 524.17 for the period September 2010 to March 2011 but increased to R1 730 412.43 from April 2011 to September 2011.**" (*paragraph 10.3.1 of the final report*).

55.2. The report further states that "**The explanation that water and electricity charges are not consistent is accepted**". (*paragraph 10.3.2 of the final report*).

55.2.1. There are no adverse findings to answer here.

55.3. The report states "**however what is not accepted is the argument that the rest of the payments comprised of rentalisation in respect of fittings and furniture which formed part of a turnkey solution agreement reached with Abland subsequent to the main agreement and added as an addendum to the main lease agreement. As these expenses were not included in the lease agreement signed on 21 August 2009 between Abland and the Commission and were not approved by the Commission, the conduct of Adv. Tlakula in that regard was irregular, improper and constituted maladministration.**" (*paragraph 10.3.3 of the final report*).

55.3.1. The matter of tenant specific installations was indicated in the Public advertisement. Please also refer to the communication to Rand Merchant Bank dated 31 March 2010 and co-signed by the then Chairperson of the Commission which confirms these arrangements. See paragraph 42.2 above.

55.3.2. The rentalisation of tenant specific immovable installations was properly dealt with in addenda to the main agreement once actual costs – which were all pre-approved before implementation – were known. No legal prescripts were transgressed and this aspect is thus not irregular.

55.3.3. Movable assets acquired in terms of the turnkey solution were not rentalised but were paid for.

55.4. The report states that "**also not acceptable is the fact that the turnkey features went beyond what was anticipated in the contract, which envisaged permanent features and included items such as furniture which the Commission already had, having purchased most of such furniture whilst it occupied the 260 Walker Street Building.**" (*paragraph 10.3.4 of the final report*).

55.4.1. The bulk of furniture used at the previous premise of the Electoral Commission had been acquired in 1998 and had long since had a book value of R1 per item. Dilapidated items were written off as per Treasury prescripts and sold at Public auctions. Usable furniture was either moved to the new premises or transferred to a government department. Treasury prescripts in that regard were complied with.

55.5. The report states that "**it was also not acceptable that Abland charged handling fees for procuring the turnkey features between 5 and 12%, in contravention of the 2% of the cost plus VAT agreed to in the contract signed between 12 and 19 April 2010 with Adv. Tlakula representing the Commission and Mr D S Savage of Abland.**" (*paragraph 10.3.5 of the final report*).

55.5.1. The turnkey solution is an offer by many developers and was proposed by both the final two bidders. It, however, played no

role in the evaluation of the bid by EXCO or the approval thereof, by the Commission.

55.5.2. For the movable assets Abland had two subcontractors which they regularly used for turnkey solutions and their selection was not a choice by the Electoral Commission as such. Both these sub-contractors had direct access to factories/manufacturers and could thus offer prices much lower than if normal wholesale and retail margins were taken into consideration.

55.5.3. The one sub-contractor dealt with more standard equipment and furniture and charged a 5% handling fee above (factory/manufacturing) cost to Abland whilst the second dealt with furniture that had to be designed and specifically built for the Electoral Commission to fit into the office configuration. The latter charged a handling fee of 12.5% to Abland. The handling fee charged to Abland to arrive at a price charged to Abland by the sub-contractors covered the delivery and installation of furniture and equipment such as bulk filers as well as them dealing with warranties on behalf of the Electoral Commission during the period of guarantee.

55.5.4. The contract with Abland did not deal with how the price they would charge for furniture and equipment was arrived at, but only with the 2% co-ordination fee they would levy. The company was, however, very transparent in how they dealt with the matter and they disclosed in all instance how the price was determined by indicating both the manufacturing cost charged and the sub-contractor cost (fee).

55.5.5. It is also confirmed that no item was procured without a quotation being submitted to us where we could consider appropriateness, affordability and the reasonableness of the

between October 2010 and July 2011. (*paragraph 10.4.1 of the final report*).

56.2. **However, the said amount was refunded to the Commission on 21 February 2012, without interest. Evidence indicates that the financial loss to the Commission in terms of interest was due to factors including not having a termination clause in the lease agreement and what can be termed as haphazard handling of the move, and, possibly, reckless use of Public funds**" (*paragraph 10.4.2 of the final report*)"

56.2.1. The case for the move from 260 Walker Street (the previous office of the Electoral Commission) is well documented and its merits accepted by the Office of the Public Protector in her report. However, the following facts need to be clarified:

56.2.2. When the contract expired at the end of September 2008 the landlord was not prepared to enter into a contract for a period shorter than 4 years. The Electoral Commission had to either vacate the building promptly or extend the lease. The Electoral Commission proposed a shorter lease period (i.e.18 months) to the landlord but this was not accepted. In this context an escape clause was not a possibility.

56.2.3. At the time of the signing of the extension of the lease the Electoral Commission had already agreed with the Department of Public Works ("**DPW**") and the Department of Human Settlements that they would take over the lease. The Electoral Commission thus insisted on the inclusion of a clause permitting sub-letting. The landlord was familiar with the long-term plans involving DPW and agreed to this.

56.2.4. The Electoral Commission remained contractually liable for the lease and thus in law remained responsible for paying the

rental for 260 Walker Street until it was either sub-let or the lease was cancelled if a new lease was entered into by DPW. A formal offer was made by DPW during December 2010 and this included the fact that the period October 2010 to December 2010 would be rent-free with DPW/Human Settlements paying rental from January 2011. The Electoral Commission would thus only be liable for the period it occupied the building. The Electoral Commission knew from the outset and before it vacated the building that it would be fully refunded for the rentals it had incurred once DPW concluded the new lease with the landlord.

56.2.5. The formal approval for paying double rental by the Electoral Commission only related to September 2010 as any additional rentals would have constituted fruitless and wasteful expenditure. It is evident that September 2010 would have been the last month in which the Electoral Commission would be liable for the rental of 260 Walker Street. However, as it took longer for DPW to eventually conclude the lease agreement with the landlord and the Electoral Commission continued to honour the existing lease, as it was legally bound to do so. All parties involved were aware that such rentals incurred after September 2010 would be refunded. This was eventually done. In this regard, see Annexure **"PT17".**

56.2.6. The landlord refunded the Electoral Commission once DPW/Human Settlements met their contractual obligation retrospectively. The escape clause did not provide for the payment of interest back to the Electoral Commission.

57. The report states that "**On allegations of irregular advance payment of a lump sum in the amount of R22 603 374.00 in March 2010**. (*paragraph 10.5 of the final report*).

57.1. **It is true that advance payments were made to Abland in respect of the Riverside premises in March 2010 in the amount of R1 653 215.46.** (*paragraph 10.5.1 of the final report*).

57.2. **Adv. Tlakula's explanation that the amounts were part of a 50% deposit for the fixtures and movables forming part of the turnkey solution is not contradicted by evidence. It is of grave concern though that this is part of the procurement that was done in contravention of the contract between Abland and the Commission, which contract had required that the procurement of these be subjected to an open market.** (*paragraph 10.5.2 of the final report*).

57.3. **No evidence could be found indicating that an amount of R22 603 374.00 was paid in March 2010 by the Commission.** (*paragraph 10.5.3 of the final report*).

57.4. **An amount of R R22 603 374.00 was approved as an amount for the fitting out budget in respect of the second addendum between Riverside Office Park Trust and the Commission which was signed on the 25 and 31 March 2011 respectively. This amount was to be rentalised over the period of the lease**". (*paragraph 10.5.4 of the final report*).

57.4.1. Details of the particular payment referred to in paragraphs 57.1 and 57.2 above are attached as Annexure "**PT18**". In this particular case quotations were obtained and submitted. That was, however, not the case for all the movable items procured in terms of the turnkey solution and we thus declared the total expenditure as irregular in our financial statements.

58. The report states that "**With regard to the allegations of irregular payment of a lump sum amount of R26 979 155.00 for the building in December 2010** (paragraph 10.6 of the final report)

58.1. **Indeed, there was payment of R26 716 023.92 to the Riverside Office Park Trust but part of the amount was eventually credit noted resulting in the final payment for the month of December being R11 014 325.12**. (*paragraph 10.6.1 of the final report*)

58.2. **This amount was in respect of the December 2010 and January 2011 rentals as well as payment of movables forming part of the turnkey. There was no irregularity in this regard. However, as stated earlier, the fact is the procurement process in respect of the turnkey solution was not subjected to an open market, making it irregular**." (*paragraph 10.6.2 of the final report*).

58.2.1. The invoice was for R26 716 023.92 and it was accompanied by a credit note for deposits already paid. The actual payment was thus for R11 014 325.12 and not R26 716 023.92 as incorrectly concluded by the Public Protector form the complete documentation submitted to her. The credit note accompanied the invoice and was not eventually submitted.

58.2.2. The irregular expenditure is covered in detail elsewhere in this submission. There are no other adverse findings to answer here.

Submission on the finding of conflict of interest

59. The Public Protector makes the finding that "**There was indeed an undisclosed and unmanaged conflict of interest between the then Commission Chief Electoral Officer, Adv. Tlakula's responsibility to act in the best interest of the Electoral Commission as its accounting officer and her special business relationship with Hon. Mufamadi, her chairperson and co-director in Lehotsa Holdings**".

60. By her own admission, the Public Protector accepts that there are many different views on what constitutes conflict of interest (paragraph 9.16.7 of the

final report). The Public Protector proceeds to quote a number materials upon which she relies, some of which define conflict of interest with reference to personal or financial interest (paragraph 9.16.9 of the final report).

61. In the light of different interpretations on conflict of interest I submit that my conduct, as Chief Electoral Officer, as regards conflict of interest, must be adjudged against the prescripts of the policy of the Commission as it stood at the time. I say so because each and every institution sets its own code to which everyone who is the subject of that institution shall be bound. Thus these policies will differ from one institution to the other.

62. The Employees' Policy Manual of the Electoral Commission provides in relation to conflict of interest that:

> *"All employees have duty to promote the reputation and business of the Electoral Commission and not make any personal gain at the expense of or as a result of either employment by the Electoral Commission. Decisions and functions carried out during the scope of employment must be directed at what is in the best interest of the Electoral Commission.*
>
> *Personal interests must not conflict with those of the Electoral Commission. Where a possible conflict of interest arises or where an employee has or obtains a financial or other interest in a company or firm with which the Electoral Commission enters into a business transaction, or where the interest is such that it may influence the outcome of any decision or benefit any person or company or firm, the interest must be disclosed in writing to the Commission as soon as it arises and the employee must refrain from participation in any way in related business dealings."*
>
> *Written disclosure is effected by the employee making an appropriate entry in the register kept for this purpose in the Office of the CEO".*

63. I respectfully submit that I complied with this latter aspect of the policy by making disclosure of all my interests as appears in Annexure "**PT19**" hereto.

64. I understand the policy to deal with two distinct aspects. On the one hand, it deals with a conflict in instances where an employee has or obtains a financial or other interest in a company which enters into a business transaction with the Electoral Commission. This aspect presupposes the existence of a personal or financial gain. The second aspect of the policy entails a subjective determination by an employee in instances where the "interest" may influence the outcome of any decision or benefit any person or company. In both instances the policy requires that the interest must be disclosed in writing to the Commission as soon as it arises and the employee must refrain from participating in related business dealings.

65. I hold the view that the Employee Policy Manual of the Electoral Commission prohibits an employee from making any "*personal gain at the expense of, or as a result of their employment by the IEC.*" The expression "*personal gain*" is not defined. I submit that this expression, within this context, must mean financial gain. I did not stand to make any financial gain in the contract under consideration. Further, the interest I have in Lehotsa Investment Holdings (Pty) Ltd ("**Lehotsa**") was not, I believe, of a nature that would impact upon my judgment in participating in the evaluation process pertaining to the subject tender or in any way improperly benefit anyone. More so that Lehotsa is a Broad Based Black Economic Empowerment group comprising numerous persons and entities. It is also important to state that my shareholding in Lehotsa is minute.

66. I further wish the Committee to have regard to the following relevant facts:

    66.1. It is common cause that my interest in Lehotsa will not derive me any direct or indirect financial interest in the lease concluded between the Commission and Abland (Pty) Ltd;

66.2. It is also common cause that I am not a director or a shareholder of Manaka, which company is a shareholder in the Abland (Pty) Ltd, the company to which the tender was awarded;

66.3. that Lehotsa is not in any way connected with Manaka by way of subsidiarity. None of the companies have a juristic relationship with the other. The directors of Manaka do not have any fiduciary duty to Lehotsa. Mr Mufumadi's fiduciary duty to Lehotsa is distinct to the fiduciary duty he holds towards Manaka. Most significant I do not have any fiduciary duty to the directors of Manaka;

66.4. I was not at the meeting of EXCO that compiled the shortlist of bidders; I was only one of six members of EXCO who undertook the evaluation of the bids; none of the members of EXCO made any declarations of interest at the commencement of the evaluation. This was obviously inadvertent; EXCO submitted to the Commission two bidders without indicating any preference or recommendation of the one over the other;

66.5. The Commission took the decision to award the tender to Abland (Pty) Ltd. This was not a decision of the EXCO of which I was part.

67. I attach hereto the standard declaration form which would ordinarily have been completed by all members of EXCO who participated in the tender evaluation marked "**PT20**:" It is apparent from that the declaration required to be made would be to the effect that:

"I,.... do not have any shareholding, or any business interest, and do not provide any consulting services, nor provide any business service for which I am remunerated on and I do not have any interest indirectly whatsoever, in any of the companies that are being considered today for the provision of services to the Electoral Commission"

68. It is thus plain that the declaration in accordance with the Commission's policy is generally geared towards managing personal or financial gain as I have indicated elsewhere above.

69. In *V Medical Administrators (Pty) Ltd and Another v Jacques and Others*[13] the court held that:

> *"It should also be remembered that not every interest necessarily constitutes a conflict of interest. Regard must be had to the particular circumstances in each case....."*[1]

70. We submit that the principles enunciated in the *V Medical Administrators* case are of direct application in the instance of this investigation.

71. It is also important to mention that the interpretation of the policy does not appear any clearer to the Public Protector. In the Provisional Report, the Public Protector had stated that no "*actual*" conflict of interest exists, but that there was a "*perceived*". Conflict. However, in the final report, the Public Protector makes a different finding to the effect that there was in fact a conflict of interest. Nevertheless, the Public Protector goes further to recommend that the conflict of interest policy of the Electoral Commission be reviewed. I submit that this recommendation can only be made on the basis of the appreciation that the policy is ambiguous.

72. The rule of law requires that rules, policies, regulations and laws must be clear and accessible to be legally enforceable. Absent that, the enforceability of such rules, policies or laws may be susceptible to challenge.

73. I reiterate that the Public Protector accepts that there was uncertainty in the "*Conflict of Interest Policy*" of the Electoral Commission, hence the recommendation that it be reviewed. I am therefore at a loss that the Public Protector would, under these circumstances, move from the finding of "*no actual conflict*", but a "*perceived conflict*" in the Provisional Report to a finding

[13] (2010/46241) [2010] ZAGPJHC 131 (9 December 2010)

that the finding that I was guilty of "*unmanaged and undeclared conflict of interest*".

74. I submit that, viewed against the backdrop of the policy of the Commission, this finding cannot fairly be made.

SUBMISSIONS ON REMEDIAL ACTION

75. Before I address the remedial action recommended by the Public Protector, I wish to bring to the attention of the Committee that the recommendations that the Public Protector made in the Provisional Report are substantially different to the ones she made in the final report (attached hereto see remedial action that was recommended by the Public Protector in the provisional report marked "**PT21**").

76. I wish to make an observation that the recommendations made by the Public Protector in the final report seem to have been influenced by the recommendations contained in the letter from "*the Concerned IEC Employees*" dated 16 July 2013 that was forwarded to the Deputy Chairperson of the Commission on 17 July 2013 and attached hereto marked "**PT22**". This letter was forwarded to all Commissioners by the Deputy Chairperson. In this letter it was "*recommended*" that amongst others:

76.1. That the Commission suspends members of Commissioner Tlakula's Executive Committee who participated in the awarding of the building tender in question with immediate effect;

76.2. That the Commission institutes an independent forensic investigation into the finances of the organization, its procurement processes and other allegations as submitted by the staff in one of their correspondences to you;

76.3. That the Commission stops administration from harassing or victimizing employees suspected of being whistle blowers in the IEC Building lease saga;

77. I wish to make the following submissions regarding the remedial action recommended by the Office of the Public Protector.

78. In paragraph 11.1, the Public Protector recommends that –

"*The Speaker of Parliament in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Adv. Tlakula for her role in the procurement of the Riverside Office Park Building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly, advised the President of the appropriate action to take.*"

79. I assume that reference to the Speaker of "*Parliament*" denotes reference to the Speaker of the National Assembly.

80. I submit that the recommendation of the Public Protector is flawed for the following reasons:

80.1. The Speaker of the National Assembly does not possess any authority over the activities of the Electoral Commission or the conduct of the Commissioners (including me in my capacity as Chairperson of the Commission). In terms of Section 181(5) of the Constitution read with Section 3(1) of the Electoral Commission Act, the Commission (including the Commissioners) is accountable to the National Assembly[14] and the Commission is independent and subject only to the Constitution and the law;[15]

[14] Section 181(5) of the Constitution
[15] Section 3(1) of the Electoral Act

80.2. similarly, the Electoral Commission is not clothed with any authority to act against another Commissioner, for its authority suffers the same constraints as those pertaining to the Speaker of National Assembly;

81. I further submit that reference to the Speaker of the National Assembly and to the President in this remedial action directed by the Public Protector appears to be predicated on the provisions of Section 7(3)(a)(i)-(iii) of the Electoral Commission Act No. 51 of 1996 which reads:

"*A* Commissioner *may* –

(a) only be removed from office by the President –

(i) on the grounds of misconduct, incapacity or incompetence;

(ii) After a finding to *that effect by committee of the National Assembly upon the recommendation of the Electoral Court; and*

(iii) The adoption by a majority of the members of that Assembly of a resolution, calling for that Commissioner's removal from office;"

82. The Public Protector correctly finds that her investigation related to matters which arose when I was the Chief Electoral Officer of the Commission and not a Commissioner or Chairperson of the Commission, which is the position I presently hold. There is no legislation invoking the Speaker of Parliament or the President in allegations of improper conduct by the Chief Electoral Officer.

83. Despite acceptance by the Public Protector of the distinct positions I occupied, the Public Protector in her report fails to take into account that the irregularities of which I am accused pertain to the period prior to my appointment as a Commissioner and Chairperson of the Electoral Commission. All the complaints leveled against me pertain to alleged improper conduct committed by me during my tenure as the Chief Electoral Officer and thus are matters which fall under the remit of the Electoral Commission in terms of the provisions of Section 12 of the Electoral

Commission Act. In terms of Section 12, the Chief Electoral Officer is the Head of the Administration and the Accounting Officer of the Electoral Commission and may exercise all such powers and perform all such duties and functions as may be entrusted or assigned to him or her by the Electoral Commission or in terms of the Electoral Act or any other law.

84. Section 12(1) of the Electoral Commission Act confers on the Commission the power to appoint a suitably qualified person as the Chief Electoral Officer. Section 12(5) of the Electoral Commission Act empowers the Commission to prescribe the conditions of service of the Chief Electoral Officer. Any allegation of improper conduct on the part of the Chief Electoral Officer is a matter falling within the competence of the Commission and not the Speaker of the National Assembly or the President. I submit that the recommendation made by the Office of the Public Protector cannot competently be effected by the Speaker of the National Assembly.

85. In paragraph 11.2 (11.2.1 to 11.2.8) the Office of Public Protector recommends a number of remedial actions to be taken by the Electoral Commission. I will deal with these recommendations in general terms –

85.1. Non-compliance with the Treasury Regulations and PPPFA prescripts resulted in the Auditor General (AG) declaring the expenditure as irregular;

85.2. We disclosed this irregular expenditure in the 2010/11 Annual Financial Statements and in every subsequent year thereafter and will disclose it as such in every subsequent year for the duration of the lease agreement;

85.3. Our Annual Financial Statements for the year 2010/11 formed part of the Annual Report to the National Assembly and were discussed during the presentation of this report in the Portfolio Committee on Home Affairs and formed part of a Public record long before the commencement of the investigation by the Office of the Public

Protector. Therefore, at the time the Office of the Public Protector conducted its investigation the matter had already been dealt with by the AG and reported accordingly to National Treasury.

85.4. I will refrain from expressing a view on the remaining recommendations, especially those contained in paragraphs 11.2.3, 11.2.4, 11.2.5 and 11.2.7. I believe that these matters may best be addressed by the Electoral Commission.

85.5. I am however aware that the Electoral Commission has now reviewed its Supply Chain Management Policy and the review of the Conflict of Interest Policy is under consideration. This addresses the remedial actions which are referred to in paragraphs 11.2.6 and 11.2.8, respectively.

86. In addition, I wish to address the letter sent by the Office of the Public Protector to the Speaker of the National Assembly on 28 August 2013, annexed as ("**PT23**")

87. This letter was never furnished to me by the Public Protector. I requested a copy of it from the Chairperson of the Committee after noting from the perusal of the Order Paper of the National Assembly for Wednesday, 11 September 2013 that the motions to be considered by the National Assembly on that day note "*that in correspondence to the Speaker, the Public Protector requested that consideration be given to referring the report to the Electoral Court to allow it to investigate the matter in terms of Section 20(7) of the Electoral Commission Act (Act 51 of 1996)*". This letter was only furnished to me on 1 October 2013.

88. I submit that the recommendation of the Public Protector to the National Assembly as contained in the letter of 28 August 2013 is invalid and unlawful for the following reasons:

88.1. The Public Protector published the Report on 26 August 2013. The remedial actions recommended by the Public Protector to the Speaker of the National Assembly in terms of Section 182(1)(c) of the Constitution is set out in paragraphs 11.1 to 11.2.8 of the Report[16]

88.2. Upon the signing and Publication of the Report on 26 August 2013, and thus conferring upon me a right or legitimate expectation to a certain process, the Public Protector has discharged her function in relation to the investigation and thus became "*functus officio*";

88.3. It is an established principle of administrative law that an administrative decision in favour of an individual or entity, bearing directly upon his or her or its interests, *may not be revoked or amended subsequently by the authority which made the decision unless the empowering statute expressly so authorises*;

88.4. There are indeed very limited and exceptional circumstances in which it may be possible to revoke a decision that has already been announced. Hoexter states that "*An exception may exist where an error comes to the administrator's attention as soon as the decision has been announced.*"[17]

88.5. Baxter distinguishes circumstances in which there may be a need for a Public authority to revoke its previous decision. In this regard, he writes as follows:

"*Unfavourable* Decisions

It is submitted that what *is required is a balanced approach which accommodates the interests of all the parties: the Public authority, in accordance with its duty to exercise its powers 'from time to time as the occasion requires', should be obliged to reconsider its decision*

[16] on pages 218-220 of the Report

[17] Hoexter C, Administrative Law in SA, page 280; See also Daniel Malan Pretorius: 'The Origins of the Functus Officio Doctrine, (2005) 122 SALJ 832

when asked to do so, but only if it is shown that circumstances have changed in such a manner that it is likely to come to a different conclusion, or if a reasonable time has elapsed. This accords with many statutory provisions where express power to reconsider has been granted."[18]

"Favourable Decisions

It has been held *that, although the same authority which introduces something may withdraw it, it cannot thereby affect or abolish the rights which its previous act has already created. Thus favourable decisions may only be revoked with the beneficiary's consent. . . . This principle also applies in the more complex situation in which various individuals have an interest, a situation in which competing interests and rights must be determined and one which is often labelled 'quasi-judicial*[19]*. The principle only applies, however, once the decision is complete. Until that time the Public authority may change its mind as and when new factors which bear on the decision come to light."*[20]*(own emphasis)*

"Decisions based of Error or Fraud

If a Public authority has made a decision which it afterwards discovers to be based upon an error of fact or law it appears that it will nevertheless still be functus officio whether the error was within or beyond is discretionary powers. The law in this regard is uncertain; and while it is clear that where the error was one that fell within the powers of the Public authority the decision ought in the interests of certainty to be regarded as final. There is a strong argument for allowing a Public authority to challenge its own decision in court if it believes the decision to be invalid.."[21]*(own emphasis)*

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18 Baxter Administrative Law page 373.
19 The Investigation of the Public Protector is a quasi-judicial process
20 Baxter Administrative Law page 373-375.
21 Baxter Administrative Law page 372-374

88.6. If revocation of the decision will adversely affect rights of third parties, it has been held that holders of such rights must be heard before the decision is revoked[22].

89. In light of the above, I am of the view that the Public Protector cannot seek to amend or supplement her findings and/or recommendations after the fact, more so under circumstances when she did not afford me an opportunity to make representations on the proposed amendment or supplementation – she is "*functus officio*".

90. It also appears that the letter of the Public Protector of 28 August 2013 may be intended to constitute a distinct complaint by the Public Protector to the Speaker of National Assembly when one has regard to the following statements made by the Public Protector in paragraphs 3 and 4 of the said letter:

> *"3.....the widely spread submissions made by Adv. Tlakula, Chairperson of the Electoral Commission, in the media in which she challenges my investigation's procedural and substantive fairness.*
>
> *4. In view of the above and in order to ensure that fairness prevails, I would humbly request you, the Honourable Speaker, to intervene in terms of section 2(b)(iii) of the Public Protector Act, 23 of 1994, and consider referring the matter to the Chairperson of the Electoral Court to allow him an opportunity to consider investigating the matter in terms of section 20(7) of the Electoral Commission Act, 51 of 1996, which states that: "The Electoral Court may investigate an allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a Committee of National Assembly referred to in section 7(3)(a)(ii)"."*

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22 Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC); See also Majake v Commission for Gender Equality 2010 (1) SA 87 (GSJ); Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd [2997] 1 All SA 154 (SCA); Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd 1950 (3) SA 598 (T)

91. I assume that reference to section 2(b) (iii) in this letter is supposed to be reference to section 8(2)(b)(iii) of the Public Protector Act. If my assumption is correct, I submit that the Public Protector's letter is flawed and thus not one upon which the National Assembly should act for the following reasons:

91.1. The complaint is couched in such vague terms that it does not offer the National Assembly adequate information or particularity to determine the merits of the complaint (or lack thereof);

91.2. In particular, the Public Protector fails to state the allegations and/or details of "*the submissions*" made by me which form the subject of her complaint;

91.3. The lodgement of the complaint against me by the Public Protector amounts to administrative action, in respect of which she is required in terms of Promotion of Administrative Justice Act, 2002 to follow the rules of natural justice, which would require that I be afforded an opportunity to address her on her complaint before she can take a decision whether or not to proceed with it;

91.4. In so far as the Committee may wish me to make submissions on the complaint of the Public Protector, I have not been provided with particulars of the complaint or the basis thereof so as to enable me to address the Committee appropriately and fully – the complaint is very general and plainly vague;

92. Accordingly, I submit that the Committee cannot fairly and objectively deal with this complaint until the details of the offensive submissions I allegedly made which form the basis of the complaint by the Public Protector are submitted to it.

93. Furthermore, I wish to bring to the attention of the Committee another letter written by the Office of the Public Protector to the Electoral Commission dated 17 September 2013 in which she directs that "**the remedial action taken in**

paragraph 11.2 of my report also recuses the Chairperson from participating in the processes to be employed by the Commission in implementing the remedial action in my report". A copy of this letter is attached marked "**PT24**". This letter suffers the following challenges:

93.1. First, insofar as the Public Protector seeks to amend or supplement her recommendations in the Report, the Public Protector is *functus officio* and thus cannot lawfully amend or supplement her findings in this manner. In this regard, I refer to the authorities I have quoted above on this aspect elsewhere above;

93.2. The recommendation is unlawful in that it violates the provisions of Section 10 of the Electoral Commission Act which deals with the management of conflict of interest during proceedings of the Commission. Section 10 (2) of the Electoral Act provides that if at any stage during the course of any proceedings before the Commission it appears that any member has or may have an interest which may cause such a conflict of interest to arise on his or her part, such member shall forthwith and fully disclose the nature of his or her interest and leave the meeting so as to enable the remaining members to discuss the matter and to determine whether such member is precluded from participating from such meeting by reason of conflict of interest;

93.3. I therefore submit that my participation in any discussions pertaining to the remedial actions recommended by the Public Protector in paragraph 11.2 of the Report can only be dealt with by the Commission in accordance with Section 10 and certainly not within the province of the Office of the Public Protector to pronounce upon.

MISDIRECTION ON QUESTIONS OF LAW

94. I submit that the Office of the Public Protector has misdirected itself, alternatively failed to apply the law correctly, in a number of respects which I point out below.

95. *First*, section 6(9) of the of the Public Protector Act, 1994 dealing with reporting matter and additional powers of the Public Protector provides that the Public Protector may only investigate a complaint referred to her within two (2) years from the occurrence of the incident or matter concerned.

96. It is common cause that the procurement of the lease for the building occupied by the Commission was completed during 06 July 2009 when the Commission took the decision to award the tender to Abland. The complaint was lodged for the first time during October 2011, a period of approximately four (4) months more than the period stipulated in the Act. The section reads in the relevant part as follows:

"*Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned*"

97. The Public Protector does not cite any special circumstances or exercising any discretion in conducting an investigation outside the period prescribed by the Public Protector Act. I submit that the acceptance of the complaint by the Office of the Public Protector outside the stipulated period without demonstrating or recording special circumstances for doing so is in unlawful.

98. *Second*, at the risk of repeating myself, the Public Protector addresses a number of remedial actions in her Report, key to which in my case is the one that:

> "*The Speaker of Parliament in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Adv. Tlakula for her role in the*

procurement of the Riverside Office Park Building to accommodate the Head Offices of the Commission in light of the undisclosed and unmanaged conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly, advised the President of the appropriate action to take."

99. The reference to the "*Speaker of Parliament*" and to the President in this remedial action directed by the Public Protector appears to be predicated on the provisions of Section 7(3)(a)(i)-(iii) of the Electoral Commission Act No. 51 of 1996 which reads:

"*A* Commissioner *may* –

(a) only be removed *from office by the President* –

(i) on the grounds of misconduct, incapacity or incompetence;

(ii) After a finding to *that effect by committee of the National Assembly upon the recommendation of the Electoral Court; and*

(iii) The adoption by a majority of the members of that Assembly of a resolution, calling for that Commissioner's removal from office;"

100. I submit that this is a misdirection on a question of law. The provisions of Section 7 of the Electoral Commission Act deal with the terms of office, conditions of service, removal from office and suspension of Commissioners. The Public Protector correctly finds that her investigation related to matters where I was the Chief Electoral Officer of the Commission and not a Commissioner or Chairperson of the Commission, which is the position I presently hold. There is no legislation invoking the Speaker of Parliament or the President in allegations of improper conduct by the Chief Electoral Officer.

101. Section 12(1) of the Electoral Commission Act confers on the Commission the power to appoint a suitably qualified person as the Chief Electoral Officer. Section 12(5) of the Electoral Commission Act empowers the Commission to

prescribe the conditions of service of the Chief Electoral Officer. Any allegation of improper conduct on the part of the Chief Electoral Officer is a matter falling within the competence of the Commission and not the Speaker of National Assembly or the President.

102. *Third*, in the letter dated 28 August 2013 and addressed to the Speaker of the National Assembly the Public Protector requests the Speaker of the National Assembly to intervene in terms of Section 2(b)(iii) (presumably referring to Section 8(2)(b)(iii) of the Public Protector Act 23 of 1994) and consider referring the matter to the Chairperson of the Electoral Court to consider investigating the matter in terms of Section 20(7) of the Electoral Commission Act 51 of 1996. Section 20(7) of the Electoral Commission Act, 1996 confers power on the Electoral Court to *investigate allegations of misconduct, in capacity or incompetence of a member of the Commission.(own emphasis)*

103. I submit that none of the conduct with which I am accused subjects me to the jurisdiction of the Electoral Court as contemplated in section 20(7) of the Electoral Commission Act. I only become a Commissioner of the Electoral Commission a while after the subject procurement was completed.

104. *Fourth*, the Office of the Public Protector misdirected itself when it found in a number of respects that certain conduct of the Electoral Commission in the procurement of the Riverside Office Park lease constituted "*maladministration*". The Office of the Public Protector derives its powers and authority from the Public Protector Act. Section 6(4)(a)(i) of the Public Protector Act, 1994 which reads:

> "4 *The Public Protector shall, be competent –*
>
> *(a) to investigate, on* his *or he own initiative or on receipt of a complaint, any alleged –*
>
> *(i) maladministration* in *connection with the affairs of government at any level;*

105. Whereas the Electoral Commission is an organ of state as contemplated in section 239 of the Constitution, the affairs of the Electoral Commission do not constitute the affairs of "*government at any level*" as contemplated in the above provision of the Public Protector Act and thus the Office of the Public Protector misdirected itself when it found that there were instances "*maladministration*" in the procurement process conducted by the Electoral Commission .The Public Protector Act confines *maladministration* only to conduct of government. Although part of the State, the Electoral Commission does not form part of government.

106. *Fourth*, the Office of the Public Protector misdirected itself when it ruled that the common law (and thus the rules of natural justice) does not apply in proceedings before it. The performance of the functions of the Office of the Public Protector constitute "*administrative action*" as contemplated in PAJA and thus the rules of natural justice *i.e.* the right of persons subject to an investigation by the Office of the Public Protector to be heard before a decision is made an integral part of that process.

Other matters

107. I have noted various media reports recently reporting that Abland, the successful bidder, was awarded the tender without providing a tax clearance certificate to the Commission. These allegations are not true. The entire consortium was requested to provide their respective tax clearance certificates before the lease was signed. Copies of the respective tax clearance certificates are annexed hereto Annexure "**PT25**"

108. I wish to mention that it is not a requirement of the law, as it is widely reported in the media, tenderers must submit their tax clearance at the time of submission of the tender.

109. In terms of regulation 14, of the Regulations promulgated in terms of the Preferential Procurement Policy Framework Act, No 5 of 2000 ("PPPFA"), "*No*

tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order".

110. Accordingly, the submission of a tax clearance certificate after closing of the bids but prior to the award or execution of the contract is in itself not unlawful.

CONCLUSION

111. I believe that the submissions which I have made herein have highlighted significant flaws in numerous material respects in the Report of the Public Protector.

112. I make these submissions to assist the Committee in considering the Report of the Public Protector with the expectation that the Committee will resolve the matter in a manner that is fair and just.

113. I reserve the right to institute a judicial review against the Report in the event it becomes necessary in the future.

Adv. Pansy Tlakula

Date....09 OCTOBER 2013.....